UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSEPH GUAY, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	CASE NO. C06-1276-TSZ REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff Joseph Guay proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Disability Insurance (DI) and Supplemental Security Income (SSI) benefits after a hearing before an Administrative Law Judge (ALJ).

Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, it is recommended that the Commissioner be AFFIRMED.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1955.[1] He completed the tenth grade of high school. Plaintiff previously worked as a janitor and housecleaner.

With a protective filing date in October 2000, plaintiff filed applications for DI and SSI benefits, alleging disability since October 6, 2000. (AR 86-89, 363-66.) His complaints included back pain, manic depression, and suicidal thoughts. (AR 119.) His applications were denied at the initial level and on reconsideration, and he timely requested a hearing.

ALJ Arthur Joyner held a hearing on May 5, 2003 and issued a decision unfavorable to plaintiff on October 2, 2003. (AR 390-400.) Plaintiff appealed and, because the recording of the ALJ's hearing could not be located, the Appeals Council remanded the matter for an additional hearing. (416-17.)

ALJ M.J. Adams held a second hearing on December 19, 2005, taking testimony from plaintiff. (AR 671-92.) On February 4, 2006, ALJ Adams issued a decision finding plaintiff not disabled. (AR 21-31.)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on August 25, 2006, making the ALJ's decision the final decision of the Commissioner. (AR 11-14.) Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

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[1] Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since his alleged onset date. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's manic depression and degenerative disc disease severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments did not meet or equal the criteria for any listed impairment. If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ assessed plaintiff's RFC and found him unable to perform his past relevant work. If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. Applying the Medical-Vocational Guidelines, the ALJ found plaintiff capable of making an adjustment to work existing in significant numbers in the national or regional economy.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750

(9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff asserts that the ALJ erred in failing to consider his leg impairments at step two and beyond. He avers that the ALJ failed to provide sufficient reasons for rejecting the opinions of examining physician Dr. Brian Buchea, treating physician Dr. Greg Stern, and nurse practitioner Melinda Werny, and impermissibly based his decision on speculation as to plaintiff's activities. Plaintiff further argues that the ALJ erred in failing to consider his physical impairments under the listings, either individually or in combination with his mental impairments. Finally, he argues that the ALJ erred in relying solely on the Medical-Vocational Guidelines given his combination of severe mental and physical impairments, resulting in exertional and non-exertional limitations. He requests remand for an award of benefits or, alternatively, for further administrative proceedings.

Defendant argues that the ALJ's decision is supported by substantial evidence and should be affirmed. For the reasons described below, the undersigned agrees that the Commissioner's decision should be affirmed.

Step Two

At step two, a claimant must make a threshold showing that his medically determinable impairments significantly limit his ability to perform basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work activities" refers to "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b). "An impairment or combination of impairments can be found 'not severe' only if the evidence establishes a slight abnormality that has 'no more than a minimal effect on an individual's

ability to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (quoting Social Security Ruling (SSR) 85-28). "[T]he step two inquiry is a de minimis screening device to dispose of groundless claims." *Id*. (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the "combined effect" of an individual's impairments in considering severity. *Id*.

As indicated above, the ALJ found only plaintiff's manic depression and degenerative disc disease severe at step two. (AR 24.) She further found as follows:

> Other symptoms and complaints appear in the record from time to time, but these were mild or transient conditions that did not cause significant limitations in the claimant's ability to function. Among these is the claimant's diagnosis of significant stenosis in the right common iliac. The claimant was not limited by this condition; on the contrary, his doctor recommended exercise to treat the condition. I therefore find that this and other such mild or transient impairments are not severe under the regulations.

(*Id*. (internal citations to record omitted.))

Plaintiff argues that the ALJ overlooked at step two, and consequently at all subsequent steps, his intermittent claudication, a condition resulting from his stenosis of the right common iliac artery, and sciatica. He asserts that the claudication causes limping and limits his ability to walk without pain for long periods without rest. (*See* AR 267, 337, 350-51, 494-95.) He rejects the ALJ's description of this condition as transitory and/or remedied by exercise. (*See, e.g.*, AR 350 (in December 2002 plaintiff reported one to two year history of right buttock pain with walking or bike riding); AR 336-37 (January 2003 testing showed right hip pain after four minutes of walking); AR 468-69 (Dr. Stern continued to diagnosis peripheral vascular disease in January 2005 and, in February 2005, found: "Hyperlipidemia incompletely controlled with history of peripheral vascular disease.")) Plaintiff also points to evidence in the record as to his right and left leg sciatica, including Dr. Stern's December 2005 notation: "Patient has chronic low back pain

with right sciatica exacerbated by overuse. Condition requires restriction of lifting and bending and he gets flares with exceeding his limits requiring further restriction of activities and slowed pace of work." (AR 449.)

The Commissioner argues that the ALJ properly found these impairments not severe, relying on medical reports from Drs. Stern, Buchea, and James Damon, which failed to show any objective evidence of associated work-related limitations. (*See* AR 197-98, 267, 311-12.) The Commissioner further posits that, even accepting these impairments as severe, any error was harmless in that there was no credible evidence they limited plaintiff's functioning to any greater degree than that assessed in the ALJ's RFC assessment. (*See* AR 27 (finding plaintiff "able to lift and/or carry 20 pounds occasionally, and 10 pounds frequently; to sit and to stand and/or walk intermittently for a total of six hours in an eight hour workday; with no limitations with regard to pushing or pulling the above amounts."; concluding these limitations allowed plaintiff to perform "'light' work[.]"))

The ALJ's step two finding withstands scrutiny. The ALJ lumped plaintiff's "other symptoms and complaints" together and concluded "these mild or transient conditions . . . did not cause significant limitations in the claimant's ability to function." (AR 24.) It cannot be said that the ALJ erred in deciding to name only plaintiff's stenosis in the right common iliac as an example and, if anything, this example was inclusive of the resulting intermittent claudication. Further, although the ALJ does not neatly tie this step two finding to her credibility assessment and assessment of the opinions of physicians at step four, these assessments do provide sufficient support for her conclusions at step two. As discussed further below, the ALJ provided numerous references to the record in concluding plaintiff's activities – including various types of farm work

– showed him "capable of performing at a considerably higher level than he alleges." (AR 26.) This finding supports the ALJ's conclusion that, despite the diagnoses and the supporting medical evidence in the record pointed to by plaintiff, plaintiff's "other" impairments did not cause significant limitations in his ability to perform basic work activities. Likewise, the ALJ's assessment of physicians' opinions at step four, as also discussed further below, lends additional support for her conclusion that these conditions were not severe. (*See* AR 27-28 (finding that, for example, Dr. Buchea's sitting, standing, and walking limitations were contradicted by plaintiff's activities.)) Finally, in failing to demonstrate error at step two, plaintiff fails to demonstrate that the ALJ's step two decision implicates the remaining steps in the sequential evaluation process.

Physicians' Opinions

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted by another physician, a treating or examining physician's opinion may be rejected only for "'clear and convincing'" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be rejected without "'specific and legitimate reasons' supported by substantial evidence in the record for so doing." *Id*. at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). Where the opinion of the treating physician is contradicted, and the non-treating physician's opinion is based on independent clinical findings that differ from those of the treating physician, the opinion of the non-treating physician may itself constitute substantial evidence. *See Andrews v. Shalala*, 53 F.3d

1035, 1041 (9th Cir. 1995). It is the sole province of the ALJ to resolve this conflict. *Id*.

A. Examining Physician Dr. Buchea

Plaintiff maintains the ALJ failed to provide sufficient reasons for rejecting examining physician Dr. Buchea's opinion limiting him to no more than thirty minutes of standing and ten minutes of walking or sitting at a time. (*See* AR 200.) While the ALJ agreed with lifting limitations assessed by Dr. Buchea, he rejected the sitting, standing, and walking limitations upon concluding that plaintiff's activities – including "working on a farm, unloading hay, feeding and washing animals, riding a bike" – show him capable of doing these activities for longer than found by Dr. Buchea. (AR 28.) Plaintiff argues that the ALJ impermissibly rejected Dr. Buchea's opinions based on speculation about the extent of his activities. He notes that, despite references in the record to his "bike riding[]" (AR 350), "taking care of numerous animals including livestock[]" (AR 312), "helping friends unload hay from a wagon" (AR 480), and "washing dogs[]" (AR 466), the record lacks any detail as to the time and effort he actually expended performing these activities. He points to his testimony at the hearing that he never did any kind of actual farm work, including "bucking hay." (AR 681.) (*See also* AR 196 (January 2001 Dr. Buchea report: "Patient lives with a friend on a farm. The only activity he does besides lying around in a hospital bed, which he has in his room, is feed the chickens with some bread crumbs. This is only occasionally.")).

Defendant argues that the record disproves plaintiff's testimony, drawing in large part on the ALJ's credibility finding:

> For the bulk of the time at issue in this decision, the claimant lived with a friend on a farm. He claimed in January of 2001 that he did little on the farm but feed the chickens on an occasional basis. Ex. 4F/1. But elsewhere in the record the claimant

> reported on a consistent basis that he performed significant work on the farm. *See e.g.* Ex 12F/18 (reference to farm work in August of 2001); 12F/13 (reporting that he got a lot of exercise from work on farm in September of 2001); 28 F/44 ("continues to do light duty farm work" in June of 2003); 28F/26 (helped friends unload hay in July of 2004); Ex. 29F/65 (farm work keeps him "out of trouble" in October of 2004); 29F/46 ("working on the farm a lot" in March of 2005); 28F/9 (moving a lot of things around on the farm in May of 2005); 29F/8 (still working on the farm in November of 2005). In March of 2002, the claimant admitted that he took care of numerous animals, including livestock, on the farm (or ranch). Ex 13F/2. In January of 2003, the claimant reported that he experienced pain with bike riding. Ex 23F/7. In March of 2005, the claimant made reference to washing dogs. Ex 28F/12. These activities show that the claimant is capable of performing at a considerably higher level than he alleges.

(AR 26.) (*See also* AR 26-27 (also pointing to inconsistent reports regarding alcohol use and treatment and complaints of hallucinations as casting doubt on plaintiff's credibility.)) Defendant avers that plaintiff's activities are relevant, not necessarily in indicating plaintiff's ability to work on a sustained basis, but to the extent they bear on his believability. Defendant further asserts that the ALJ appropriately considered activities conflicting with Dr. Buchea's assessment in determining the weight to afford this physician's opinions. *See Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005) ("Credibility determinations do bear on evaluations of medical evidence when an ALJ is presented with conflicting medical opinions or inconsistency between a claimant's subjective complaints and his diagnosed conditions."); *Morgan v. Commissioner of the Social Sec. Admin.*, 169 F.3d 595, 601-02 (9th Cir. 1999) (comparing physician's opinions with contrary evidence of the claimant's abilities in the record).

The record in this case contained and the ALJ relied upon medical opinions contradictory to those of Dr. Buchea. (*See* AR 27-28, 204-09, 311-12.) Therefore, the ALJ needed to supply only specific and legitimate reasons for rejecting this examining physician's opinions. As argued by defendant, the ALJ appropriately pointed to the contradictory evidence in the record as to

plaintiff's activities in rejecting Dr. Buchea's opinions in part. Contrary to plaintiff's contention, the record contained sufficient detail as to those activities. Indeed, the sheer number of references to plaintiff's work on the farm raises serious doubt as to his contention that he never actually performed any real work.[2]

B. Treating Physician Dr. Stern

Plaintiff also argues that the ALJ failed to provide sufficient reasons for rejecting the opinions of treating physician Dr. Stern as to his physical limitations, including the need for slowed pace and bending limitations, as well as frequent problems with concentration due to chronic pain. (*See* AR 449.) Dr. Stern included these limitations on a December 2005 report. (*Id.*) The ALJ found the lifting restriction in the RFC supported by Dr. Stern's December 2005 report and pointed to Dr. Stern's August 2001 examination as demonstrating "the lack of physical signs of decreased functioning in the record." (AR 28.) However, she did not mention the other limitations identified in the December 2005 report and later stated: "There are no further opinions regarding the claimant's functioning." (AR 29.)

The ALJ's failure to specifically address all of the limitations assessed by Dr. Stern is

[2] Plaintiff did not directly challenge the ALJ's credibility assessment in his opening brief. (*See* Dkt. 18.) In reply, he posited that the ALJ's alleged step two errors necessarily implicate the credibility decision, particularly with respect to his complaints of leg pain and standing or walking limitations. As described above, plaintiff fails to demonstrate any error at step two. Moreover, even if plaintiff intended to challenge the ALJ's credibility finding, the ALJ, as required by law, provided clear and convincing reasons to reject plaintiff's testimony. *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See also Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997) ("In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains.")

troubling, particularly given his status as a treating physician. However, reading the decision as a whole, the ALJ both directly and indirectly provided sufficient reasons for rejecting any limitations beyond those included in the RFC assessment. Again, the ALJ needed only to provide specific and legitimate reasons given that the record contains medical opinions contradictory to Dr. Stern. (*See* AR 27-28, 204-09, 210-13, 311-12, 355-57.)

Immediately following the ALJ's adoption of Dr. Stern's lifting restriction, the ALJ stated:

> I also base my findings in large part on the lack of physical signs of decreased functioning in the record. For example, when examined by Greg Stern, M.D., in August of 2001, the claimant was able to walk on heel and toes. Trendelenburg was negative. Straight leg raise was negative in the sitting and supine positions. Dr. Stern assessed chronic low back pain with symptoms of right sciatica, but found no evidence of radiculopathy. In March of 2002, the claimant was noted to walk with a normal gait, with a normal erect posture. He was able to heel walk, toe walk, squat down and return from squatting position, and tandem gait. He was able to hop twice on either foot with no significant complaints. He was able to get on and off the examining table without assistance. Straight leg testing was negative to 90 degrees seated and 50 degrees when recumbent. Examining physician James E. Damon, M.D., found chronic low back strain with no significant objective findings on physical examination. He found no work precautions or limitations.

(AR 28 (internal citations to record omitted.)) Also, as stated above, the ALJ's credibility and RFC assessments described in detail activities contradicting the existence of additional physical limitations. (*See* AR 26-28.)

Additionally, with respect to concentration and pace, the ALJ stated at step three:

> Regarding the claimant's concentration, persistence, or pace, [plaintiff] reported in May of 2003 that he liked to read. On examination with Dr. Parlatore that month, the claimant was able to remember 3 of 4 objects, spell the word "world" correctly both forward and backward, do serial 7s, follow a 3-step command, follow the conversation, discuss current events, and remember all living presidents.

(AR 25 (internal citations to record omitted.)) She also later, at step four, cited to Dr. Anselm Parlatore's May 2003 evaluation as finding no other limitations beyond slight limitations in

plaintiff's ability to respond appropriately to work pressures or changes. (AR 28.)

In sum, while the ALJ arguably should have specifically recounted and discussed all of the limitations assessed by Dr. Stern, she ultimately provided specific and legitimate reasons for rejecting Dr. Stern's opinions as to those limitations.

Nurse Practitioner

Nurse practitioner Melinda Werny is not an "acceptable medical source" under Social Security regulations. *See* 20 C.F.R. §§ 404.1513, 416.913. As such, her opinions must be given the weight of lay evidence. The Ninth Circuit has held that "lay testimony as to a claimant's symptoms is competent evidence that an ALJ must take into account, unless he or she expressly determines to disregard such testimony and gives reasons germane to each witness for doing so." *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001).

The ALJ gave little weight to Werny's opinions. (AR 25, 28-29.) At step three, she noted that Werny's assessment of marked limitations of functioning conflicted with the evidence in the record showing plaintiff could function at a much higher level:

> For example, regarding his activities of daily living, the record contains frequent references to the claimant's work on a farm. In May of 2003, the claimant told Dr. Parlatore that he did his own cooking and cleaning. Socially, the claimant lives with friends on the farm, and the record contains no evidence that he does not get along with them. In May of 2003, the claimant reported that he attended church. In March of 2005, the claimant reported that he got along well with his "co-workers" on the farm. In June of 2005, the claimant reported that he had had a "great visit" to Florida, seeing his children and "good friends." Regarding the claimant's concentration, persistence, or pace, [plaintiff] reported in May of 2003 that he liked to read. On examination with Dr. Parlatore that month, the claimant was able to remember 3 of 4 objects, spell the word "world" correctly both forward and backward, do serial 7s, follow a 3-step command, follow the conversation, discuss current events, and remember all living presidents.

(AR 25 (internal citations to record omitted.)) The ALJ also found no evidence Werny understood the meaning of the terms as used on the Psychiatric Review Technique Forms (PRTF) she filled out. (*Id*.) Further, at step four, the ALJ stated:

> My assessment disagrees, however, with the several forms completed by the claimant's nurse practitioner for this agency and for the Department of Social and Health Services (DSHS), in connection with his General Assistance claim with that agency. The first of these forms was completed in January of 2001; the last was completed in December of 2005. I give the opinions of this source less weight than Drs. Parlatore and Suh for two reasons. First, the improvement in the claimant's symptoms and functioning, which began in July of 2003, is not reflected in nurse practitioner Werny's assessments, which are virtually unchanged from the time when she first started seeing the claimant in 2001 to 2005. *See e.g.* Ex. 29F/65 (in October of 2004, claimant quoted as saying "no depression, feeling good. Working at the farm keeps me out of trouble.). Nurse Werny mentioned "psychotic symptoms" in August and December of 2005, but chart notes from that period say that the claimant's auditory hallucinations had diminished considerably and were described as "minimal." As noted above, nurse practitioner Werny consistently noted auditory hallucinations, but at the hearing, the claimant described visual hallucinations. Drs. Suh and Parlatore found no evidence of manic or psychotic symptoms in the claimant's history or presentation, yet nurse practitioner Werny consistently assessed bipolar disorder and auditory hallucinations. Because her assessments are not consistent with the bulk of the medical evidence of record, I give them little weight. *See* 20 C.F.R. §§ 404.1527(d)(4), 416.927(d)(4) (explaining that the more consistent an opinion is with the record as a whole, the more weight it is given).

(AR 28-29 (some internal citations to record omitted.))

Plaintiff argues that his reported activities are not a legitimate basis for rejecting the opinions of Werny, who served as his mental health provider for a number of years. He further suggests an absence of evidence that Werny did not understand the meanings of the terms in the PRTF, noting that the forms include definitions of the pertinent terms.

However, it is clear from the above that the ALJ provided sufficient germane reasons for finding Werny's opinions entitled to little weight. The ALJ's decision on this point is supported by substantial evidence and should be upheld.

Step Three

At step three, the ALJ must consider whether the claimant's impairments meet or equal one of the impairments in the "Listing of Impairments" set forth in Appendix 1 to 20 C.F.R. Part 404, Subpart P. "In evaluating a claimant with more than one impairment, the Commissioner must consider 'whether the combination of your impairments is medically equal to any listed impairment.'" *Lester*, 81 F.3d at 829. Plaintiff bears the burden of proving the existence of impairments meeting or equaling a listing. *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005).

In this case, the ALJ discussed plaintiff's mental impairment in detail at step three. (*See* AR 25.) She concluded "that the claimant's mental health impairment does not meet listing 12.04 [affective disorder.]" (*Id.*) The ALJ subsequently stated: "I further find that none of the claimant's other impairments meets or equals the criteria of any impairment included in the Listings of Impairments." (*Id.*)

Plaintiff argues that the ALJ erred in considering his manic depression in isolation, without consideration of the combined impact of this condition with his chronic pain and its effect on his activities of daily living and concentration, persistence, and pace. He points, in particular, to the limitations assessed by Dr. Stern in December 2005. (*See* AR 449.) Plaintiff further argues that the ALJ failed to properly consider any of his physical or mental impairments in combination at step three, pointing to his degenerative disc disease, sciatica, and peripheral vascular disease causing intermittent claudication. He describes the ALJ's final conclusion that none of his other impairments meets or equals a listing as a boilerplate statement.

As argued by the Commissioner, plaintiff fails to demonstrate error at step three. "The mere diagnosis of an impairment listed in Appendix 1 is not sufficient to sustain a finding of

disability. . . . [An impairment] must also have the *findings* shown in the Listing of that impairment." *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985) (emphasis in original). Here, plaintiff fails to demonstrate that he met a listing, either individually or in combination. As discussed above, the ALJ provided sufficient reasons for rejecting the non-lifting-related limitations assessed by Dr. Stern. Nor does plaintiff proffer any plausible theory as to how his combined impairments are medically equivalent to the criteria for a listed impairment, let alone meet his burden of establishing medical equivalence. *See Burch*, 400 F.3d at 683 ("An ALJ is not required to discuss the combined effects of a claimant's impairments or compare them to any listing in an equivalency determination, unless the claimant presents evidence in an effort to establish equivalence."); *Lewis*, 236 F.3d at 514 (noting that plaintiff "offered no theory, plausible or otherwise, as to" how his combined impairments equaled a listing). Finally, the ALJ's alleged boilerplate statement is sufficient given the support provided by the evaluation of the medical evidence. *See Gonzalez v. Sullivan*, 914 F.2d 1197, 1201 (9th Cir. 1990) ("It is unnecessary to require the Secretary, as a matter of law, to state why a claimant failed to satisfy every different section of the listing of impairments. The Secretary's four page 'evaluation of the evidence' is an adequate statement of the 'foundations on which the ultimate factual conclusions are based.'") (quoted sources omitted). For these reasons, the ALJ's step three decision is supported by substantial evidence and should be upheld.

Medical-Vocational Guidelines

An ALJ may rely on the Medical-Vocational Guidelines ("guidelines" or "grids") to meet her burden at step five. *Burkhart v. Bowen*, 856 F.2d 1335, 1340 (9th Cir. 1988). "They may be used, however, 'only when the grids accurately and completely describe the claimant's abilities and

limitations.'" *Id*. (quoting *Jones v. Heckler*, 760 F.2d 993, 998 (9th Cir. 1985)). "When a claimant's non-exertional limitations are 'sufficiently severe' so as to significantly limit the range of work permitted by the claimant's exertional limitations, the grids are inapplicable[]" and the testimony of a vocational expert is required. *Id.* (quoting *Desrosiers v. Secretary of Health & Human Servs*., 846 F.2d 573, 577 (9th Cir. 1988)). *Accord Tackett v. Apfel*, 180 F.3d 1094, 1103-04 (9th Cir. 1999) ("Because Tackett's non-exertional limitations 'significantly limit the range of work' he can perform, mechanical application of the grids was inappropriate.")

Plaintiff states that the ALJ found mental and physical severe impairments imposing significant exertional and nonexertional limitations on his ability to perform basic work-related activities. (*See* AR 24, 27.) *See also* 20 C.F.R. §§ 404.1521, 416.921 ("An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.") He asserts that the ALJ, therefore, erred in mechanically applying the grids at step five. He further argues error in the grids as applied, noting that the ALJ erroneously concluded he had a GED education and relied on guideline rules requiring a high school or better education. (*See* AR 29 (finding plaintiff had a GED education and applying rules 202.20 and 202.13 from 20 C.F.R. Pt. 404, Subpt. P, App. 2, Table 2.))

Plaintiff fails to demonstrate reversible error at step five. As argued by defendant: "[T]he fact that a non-exertional limitation is alleged does not automatically preclude application of the grids. The ALJ should first determine if a claimant's non-exertional limitations significantly limit the range of work permitted by his exertional limitations." *Desrosiers*, 846 F.2d at 577 ("It is not necessary to permit a claimant to circumvent the guidelines simply by alleging the existence of a non-exertional impairment, such as pain, validated by a doctor's opinion that such impairment

exists. To do so frustrates the purpose of the guidelines.") *See also Razey v. Heckler*, 785 F.2d 1426, 1431 (9th Cir. 1986) ("The regulations do not, however, preclude the use of the grids when a nonexertional limitation is alleged. They explicitly provide for the evaluation of claimants asserting both exertional and nonexertional limitations. [20 C.F.R. Pt. 404, Subpt. P, App. 2] at § 200.00(e). The Appeals Council found that the claimed nonexertional limitations did not so affect Razey's residual capacity that the use of the grids was inappropriate. Both the Secretary's regulation and our decision in *Odle v. Heckler*, 707 F.2d 439, 440 (9th Cir. 1983), allow the use of the grids under these circumstances."), *modified* at 794 F.2d 1348 (1986); and SSR 83-14 ("Nonexertional impairments may or may not significantly narrow the range of work a person can do."; "Where it is clear that the additional limitation or restriction has very little effect on the exertional occupational base, the conclusion directed by the appropriate rule in Tables No. 1, 2, or 3 would not be affected.")

In this case, in addition to exertional limitations allowing plaintiff to perform light work, the ALJ assessed plaintiff's RFC as follows:

> A longitudinal view of the medical evidence of record supports a finding that the claimant functions mentally at a level necessary to perform basic work activity, in that he retains the mental ability to understand, remember, and carry out simple instructions; to make simple work-related decisions necessary to function in unskilled work; to respond appropriately to supervisors, coworkers, and usual work situations; and to deal with changes in a routine work setting not dealing [with] the general public.

(AR 27.) She found this assessment supported by the consultative examination of Dr. Parlatore, who noted "only 'slight' limitations" in the ability to respond appropriately to work pressures or changes. (AR 28 & 357.)

The ALJ acknowledged the limitation on the use of the grids with respect to a combination

of exertional and nonexertional impairments. (*See* AR 29 ("But when the claimant has a combination of exertional and nonexertional limitations, the applicable rule does not direct a decision, but instead serves as a guide to determine whether the claimant is disabled.")) However, she nonetheless found the grids applicable upon concluding that the nonexertional limitations described above did not erode the light and sedentary occupational base. (AR 30.) Plaintiff fails to demonstrate any error in this assessment.

Further, although the ALJ did err in assuming plaintiff had a GED and applying grid rules requiring at least a high school education, the Court agrees with defendant that this error was harmless. *See, e.g.*, *Batson v. Commissioner of the Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (applying harmless error standard to assumption made by ALJ); *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 2003) (applying harmless error standard in assessing omission of information from hypothetical to vocational expert). Application of grid rules 202.10 and 202.17 (for individuals with less than a high school education), instead of 202.20 and 202.13 (for high school graduates or more) as applied by the ALJ, would apply here and still compel a finding of "not disabled." *See* 20 C.F.R. Pt. 404, Subpt. P, App. 2.

In sum, the ALJ properly relied on the guidelines in this case at step five and her factual error was harmless. The ALJ's step five decision is, therefore, supported by substantial evidence and should be affirmed.

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CONCLUSION

For the reasons set forth above, the Commissioner's decision should be AFFIRMED.

DATED this 5th day of April, 2007.

Mary Alice Theiler
United States Magistrate Judge